

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



ORIGINAL

76-1280

**United States Court of Appeals  
For the Second Circuit**

UNITED STATES OF AMERICA,

*Appellee,*

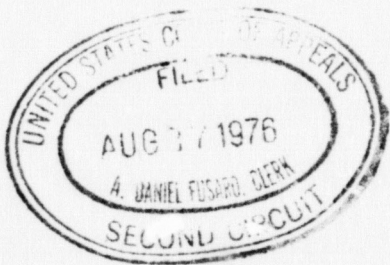
-against-

JOSE GABRIEL VELEZ-DIAZ,

*Defendant-Appellant.*

*On Appeal From The United States District  
Court For The Eastern District of New York*

**Appellant's Brief**



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## TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement .....	1
Questions Presented .....	1
The Facts .....	1
The Trial .....	1
Hearing-Pre-Indictment Delay .....	3
POINT I: Appellant Was Deprived Of A Fair Trial By An Unexplained Lengthy Pre-Indictment Delay .....	6
POINT II: The Court's Missing Person Charge Was Improper .....	9
Conclusion .....	11

## CASES CITED

United States v. Brown, 511 F. 2d 920, 925 (2nd Cir., 1975) .....	9
United States v. Feinberg, 383 F. 2d 60 (2nd Cir. 1967) .....	8
United States v. Finkelstein, 526 F. 2d 517 .....	8
United States v. Fodrell, 523 F. 2d 86 .....	8
United States v. Miranda, 526 F. 2d 1319 (2nd Cir. 1975) .....	11
United States v. Payden, F. 2d (dec. 6/8/76 No. 76-114, 2d Cir.) .....	8



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Docket No. 76-1280

- against -

JOSE GABRIEL VELEZ-DIAZ,

Defendant-Appellant  
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PRELIMINARY STATEMENT:

This is an appeal from a judgment of conviction entered the 18th day of June 1976 in the United States District Court for the Eastern District of New York; Honorable Jacob Mishler presiding. As a consequence of appellant's conviction by a jury, he was sentenced to a term of imprisonment of three (3) years and a term of special parole for three (3) years for distributing narcotics in violation of Title 21 U.S.C. Section 841(a) and (1).

QUESTIONS PRESENTED:

1. Was appellant deprived of a fair trial by the unexplained lengthy pre-indictment delay?
2. Was the Court's missing witnesses charge proper?

THE FACTS:

THE TRIAL:

An exchange of \$600.00, pre-recorded monies on August 7, 1973 went for nought, when narcotics agents did not that day effect the arrest of appellant whom Detective Balmer claims sold him cocaine at appellant's apartment located at 419 Franklin Avenue, Brooklyn, New York (T120-122, 141, 201, 202, 204-206,

208, 232, 233, 244).\* An informant James Thomas is claimed to have acted as an intermediary in arranging this sale and accompanied Detective Balmer masquerading as a drug dealer to appellant's residence to consummate the deal, (62, 63). According to Police Officer Heckmann, Mr. Thomas pre-arranged a meeting with Detective Balmer and appellant. In preparation of this meeting Mr. Thomas was searched several times and Detective Balmer was given \$600.00 of government pre-recorded money and a host of narcotics officers were dispatched to the vicinity of 419 Franklin Avenue, Brooklyn (162, 163, 192-197).

With Mr. Thomas at his side, Detective Balmer claims to have been greeted by appellant at a window of the building at 419 Franklin Avenue. Police Officer Heckmann testified to a hesitation. Appellant claims that none of this occurred, he was painting his apartment which he occupied with two other men when post office employees rang the bell and entered with letters for him and one of the men. Patrolman Heckman acknowledged sending two men to appellant's apartment prior to the dispatching of Detective Balmer (64, 196, 243, 286-288). Detective Balmer, however, testified entering appellant's apartment which was in the process of being painted by appellant and Jose Balsamo; walking to the kitchen where appellant removed the powder from the cabinets, meted out two spoons which he placed in a plastic bag. According to Detective Balmer \$600.00 of pre-recorded government money was given to appellant - \$ 10.00 taken back

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\*( ) Refers to minutes of the trial.



as gas money. All the while Mr. Balsamo continued painting the same spot in the living room (64-68, 106-111, 119).

With this transaction concluded, the white powder was driven to South 9th Street in Brooklyn, field tested - positive\*\*. The contingent of Detective Balmer, police officer Heckmann, sargeant Fortins, New York State Trooper Vespirn, Department of Justice Special Agent Cheepers, and the informant, John Thomas, were sent home without returning to 419 Franklin Avenue to arrest appellant who, if he had participated in the sale, would still be in possession of the pre-recorded money (69-71, 112, 113, 115, 120-122, 198-202). According to Patrolman Heckmann, Mr. Thomas attempted to contact appellant throughout the month of August but to no avail (241-244). However, appellant, limited in the English language, testifying through a Spanish interpreter, was shown to have caused a New York State auto registration to be completed on 8/20/73 showing his address to be 419 Franklin Avenue (50-57, 282).

#### HEARING - PRE-INDICTMENT DELAY

Appellant was not arrested for two (2) years. In 1975 agents of the Immigration Service detained appellant and eventually turned him over to the narcotics authorities. During that period, appellant had lost contact with Jose Balsamo, the painter, whom Detective Balmer claims to have observed painting

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\*\*A more elaborate test by Chemist Edward Manning also showed the powder to be concaine (28-30, 31-36).

the same spot for 5 minutes while he and appellant consummated a narcotics sale (T11-17, 343).\*\*\*

After the transaction and the field test was completed by the authorities, appellant was permitted to remain at liberty with \$590.00 of marked money, which would have been if he had participated in the sale, conclusive evidence of appellant's guilt. According to Detective Balmer, he returned to appellant's apartment at 419 Franklin Avenue a few times. Not finding the appellant there he did not leave a message with the person who answered the door and departed. Police Officer's Heckmann's version is that he sent John Thomas to the apartment to set up another sale, but this also proved fruitless. Nonetheless, Mr. Thomas without whom the authorities would have been ignorant of appellant according to the testimony of both Detective Balmer and Police Officer Heckmann, was never enlisted to ferret out appellant (166-168, 181, 184, 185, 186, 321, 333).

However, Mr. Thomas did introduce Patrolman Heckmann and Detective Balmer to a woman named Sylvia who according to their testimony, attempted to set up a sale with someone named Jose. On November 14, 1973 Sylvia took the authorities to the vicinity of St. John's Place, Brooklyn, left their car - without anyone

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\*\*\* The hearing was conducted during the course of the trial and the pagination is consecutive with that of the trial.



following them - only to return without having set up a sale or with any information as to "Jose's" whereabouts. The story was that Jose told her he had to dive for narcotics in New York harbor and had scuba equipment all over the floor of the apartment. Another attempt to find appellant through this Sylvia also failed (172-177, 182, 186, 321).

Police Officer Heckmann then tried to trace appellant through the New York Department of Motor Vehicles, first through car registrations, then through an accumulation of tickets in appellant's name. This trail led to apartment 704C of 79-11 41st Avenue, Queens. According to Police Officer Heckmann, surveillance of the apartment was without success; the occupants having left without leaving a forwarding address. Returning to Brooklyn, a sojourn to 7th Avenue between St. Mark's and Sterling Places, was also to no avail. Likewise a check of an address listed to a registration - 58 Sackett Street, Brooklyn - proved fruitless. It was not until the Immigration Service apprehended appellant at 111 Nostrand Avenue, Brooklyn in 1975 on a charge that was later dismissed, that the prosecution for the claimed August 7, 1973 sale commenced (324-331, 343).



POINT I:

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY AN UNEXPLAINED LENGTHY PRE-INDICTMENT DELAY.

A lame explanation that they wanted to make a bigger case was offered as an excuse for not arresting appellant - who if promptly arrested would have been in possession of \$590.00 of pre-recorded government money had a sale of cocaine occurred as testified to by Detective Balmer. Instead one informer and five members of a narcotic strike force went home after a field test of a light powder which Detective Balmer claims he bought from appellant, proved positive. Appellant continued his life unaware that the authorities were desirous of prosecution until he was arrested on an immigration warrant in 1975 - two years later.

During this two year period Jose Balsamo, a painter who on August 7, 1973 was engaged in painting appellant's apartment when Detective Balmer claimed to have been transacting a narcotics purchase, disappeared. Mr. Balsamo's presence in the outer-room of appellant's apartment during the sale was testified to by Detective Balmer. Although Detective Balmer opined that Jose Balsamo was not cognizant of the events that transpired in the kitchen - he was still on a ladder painting the same spot as when Detective Balmer entered - only Mr. Balsamo's testimony could have enlightened the jury as to the events of August 7, 1973. Had Mr. Balsamo's corroborated appellant's testimony that neither Detective Balmer or the informant were in the apartment, but two men claiming to be postal employees - it is likely that the result would have been an acquittal. Thus the loss of Jose Balsamo as a witness (avoidable with a prompt

arrest of appellant on August 7, 1973) severely prejudiced appellant.

The prosecution attempted to excuse the delay in arrest by testimony that a second sale was contemplated; or where Detective Balmer returned to appellant's apartment; or where Sylvia was to contact Jose on November 14, 1975. These events were a most veiled attempt to cover up the inexplicable and unexcusable delay in failing to arrest appellant immediately after the field test proved positive on August 7, 1973. In none of the instances advanced by the prosecution as reasons for the delay did the authorities follow-up. Detective Balmer's attested return to appellant's apartment was nor pre-arranged through the informant as per Detective Balmer's testimony on the trial. Nor, according to Detective Balmer, were messages left at the apartment. Equally as puzzling is the testimony concerning Sylvia going to an apartment where scuba diving equipment was strewn about the floor and that Jose as too busy diving to sell. With four officers on the case no attempt was made to follow Sylvia.

Testimony by Detective Heckmann of subsequent attempts to trace appellant as testified to by him are equally unconvincing. Appellant remained in Brooklyn throughout this two year hiatus - autos were registered in his name and parking summonses were accumulated by these automobiles. It took the Immigration Service to locate appellant in the vicinity of the apartment building he resided in on August 7, 1973.



Appellant is not a business man with a fixed place of business and associates readily available or accessible. See U.S. v. Feinberg, 383 F. 2d 60 (2nd Cir. 1967). Both appellant and Jose Balsamo - the missing witness - were aliens whose roots and availability were slight. Like Ross v. U.S., 329 F. 2d 410 (D. Cir. 1965) this was an undercover narcotics sale; an isolated instance as testified to by Detective Balmer where a prompt arrest would have been beneficial to both the prosecution and the defense. Had appellant been in possession of the pre-recorded money when arrested, a claim of being framed would have been ludicrous. If upon arrest the money was not found, this would weaken the prosecution's case. Along with the testimony of Jose Balsamo substantiating appellant's testimony, acquittal would have been likely.

Actual prejudice, a loss of a crucial witness Jose Balsamo, has been shown. See U.S. v. Payden, F. 2d (dec. 6/8/76 No. 76-114, 2d Cir.) this Court held:

"Payden has not demonstrated any prejudice to himself because of the delays, which would be necessary to show a violation of his rights."

To the same effect is U.S. v. Fodrell, 513 F. 2d 86 and U.S. v. Finkelstein, 526 F. 2d 517. No actual prejudice shown, only a possibility of prejudice.

In failing to show a compelling reason for the delay in arresting appellant the prosecution is foreclosed from advantaging itself, having impeded appellant's defense. This is not a complicated stock forged case which required careful analysis and investigation, but a simple one-transaction drug case requiring dispatch. See U.S. v. Finkelstein, supra.

POINT II:

THE COURT'S MISSING PERSON CHARGE WAS IMPROPER.

After declining to give a missing person charge, similar to the charge criticized in U.S. v. Brown, 511 F. 2d 920, 925 (2nd Cir., 1975), the Court charged:

"...., in this case, I am free to say, with the defendant's consent, that the government had an informer, James Thomas, under subpoena and was ready to bring the informer to court and made available to defendant, and the defendant waived his right to examine the informer, James Thomas..." (406)\*\*\*\*

What precipitated this charge was a portion of defense counsel's summation:

"I do not have to relate to you or challenge your thinking on what an informer is or what he represents or how much you can trust him and how much you can believe him. He is not called and the challenge is going to be made to me that possibly I could have called him as a witness. Yes, that is true, but under our law in a criminal case the defendant need not produce any witnesses and His Honor will so tell you that. This is the government's witness, basically they employed him. Mr.

MR. WEINBACH: Objection.

MR. KATCHER: They used him. I do not know about employed. They used him. He was a registered informer.

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\*\*\*\* Defense counsel did not agree to such charge (389-395).



He was given a number as you heard the testimony. He was on the records of the Joint Task Force as an informer. Whether he got paid or not, I do not care one iota but he was their man. He is the man they said supposedly introduced the cop, the detective, to my client. Is he produced to support that story? This is what the government wants you to believe.

The detective's testimony which has been shattered, in my humble view by cross examination who was shown to be a man whose credibility cannot be accepted and, yet, the only other source call it a version if you wish, is Thomas. He is not produced (sic).

You have a right each and every one, as His Honor will tell you, to refer that the failure of the government to call a witness who can give testimony in connection with the subject matter on trial, you have a right to refer that the failure by the government to call that witness would be unfavorable to the government.

MR. WEINBACH: Objection. I will ask for a ruling.

THE COURT: We will take this up in the recess. I thourhg we had an understanding on that, Mr. Katcher.

MR. KATCHER: I am going to come to this in a minute. I will cover that part. The argument is going to be advanced that I could call Mr. Thomas, yes. As I said a moment ago, yes, I could have called him if I saw fit, but it is not my obligation representing a defendant on trial to produce witnesses in the case.

His honor will tell you the defendant has a right to sit mute. He does not have to utter one word. He does not have to produce a single witness or spread a piece of proof of anything because the burden of proof is on the government, the prosecution from the inception of the commencement of the case to the last moment of the case, and that burden, his honor will tell you, never shifts to the defendant." (379-381).



The Court felt that this portion of the summation had violated an agreement between counsel and the Court:

"THE COURT: At the time you said it, I thought it was terrible; a complete violation of everything you agreed to yesterday." (391).

Defense counsel had not violated any agreement with the Court (305-315). Nor was there anything unfair in counsel's summation to the jury. The jury was told a number of times that defense counsel could have called the informant. Therefore, the trial court's missing witness charge was uncalled for; an abuse of discretion. See U.S. v. Miranda, 526 F. 2d 1319 (2nd Cir. 1975).

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD BE  
REVERSED.

Respectfully submitted,  
  
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2465 KATCHER US v. Velez-Diaz

STATE OF NEW YORK )  
: SS.  
COUNTY OF NEW YORK )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of August 1976 deponent served the within Brief upon:

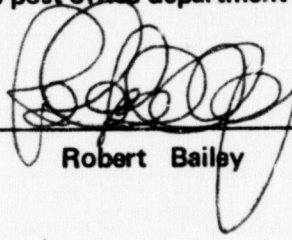
U.S. Attorney, Eastern District of N.Y.

attorney(s) for  
Appellee

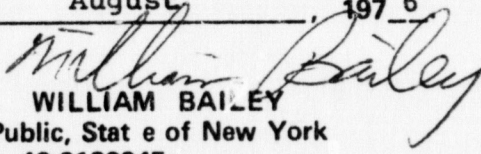
in this action, at

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Robert Bailey

Sworn to before me, this 27  
day of August, 1976

  
WILLIAM BAILEY  
Notary Public, State of New York  
No. 43-0132945  
Qualified in Richmond County  
Commission Expires March 30, 1976